

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**CONTINUUM MANAGEMENT SERVICES, LLC, ET AL,  
Plaintiffs,**

v.

**Case No. 15-145882-CK  
Hon. James M. Alexander**

**CRT MEDICAL SYSTEMS, INC,  
Defendant.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendant’s motion for partial summary disposition. Prior to January 2012, Plaintiff Continuum and Defendant CRT were competitors in the business of providing billing and certain management and administrative services to physicians and their group practices.

Sometime in 2010 or 2011, Continuum’s majority owner, Plaintiff James Schoeck, approached Defendant’s owner, David Doyle, in connection with exploring business opportunities. These discussions eventually resulted in a Purchase Agreement whereby Defendant would acquire certain assets and assume certain liabilities of Continuum. The effective date of said Agreement was January 1, 2012.<sup>1</sup>

In connection with this Agreement, Continuum and Defendant also entered into a December 1, 2011 “Pre-Closing Management Agreement” in order to assist in the transition of Continuum’s business to Defendant. The Recitals of the Pre-Closing Agreement state that Continuum intended to wind down its business between December 1 and December 31, 2011,

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<sup>1</sup> It is undisputed that the Purchase Agreement contains a typographical error identifying the effective date as January 1, 2011 (rather than 2012).

and Defendant was to collaborate with Continuum in its management during the wind down in preparation for the business transfer.

Plaintiffs filed the present suit generally on claims that Defendant: (1) failed to pay certain of Continuum's liabilities as agreed; (2) improperly took over Continuum's accounts and receivables before the January 1, 2012 effective date; and (3) failed to timely pay the purchase price – resulting in an increased capital gains tax liability on Continuum's members.

Plaintiffs' First Amended Complaint alleges a single conversion claim and three breach of contract counts. Defendant now moves for partial summary disposition of Plaintiffs' Count I for conversion claim and Count III for breach of contract – “but only as to the portion of Count III that relates to amounts owed to or for the benefit of Plaintiff Schoeck.”

Defendant so moves under MCR 2.116(C)(8) and (C)(10).<sup>2</sup> A (C)(8) motion tests the legal sufficiency of the complaint. A motion under this subrule may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, **all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant.** *Wade*, 439 Mich at 162-163; *Lepp*, 190 Mich App at 730. Additionally, when considering such motions, **the court considers only the pleadings.** MCR 2.116(G)(5).<sup>3</sup>

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<sup>2</sup> The Court will note that Defendant's Motion and Reply generally challenge the allegations contained in Plaintiffs' Complaint and largely dispute Plaintiffs' version of events. For example, Defendant argues that Plaintiffs' Response Brief “contains numerous inaccuracies,” and it “will attempt to set the record straight” with its Reply Brief. Defendant also argues that Plaintiffs make a “blatantly false statement” and they are “blatantly misleading the Court.” Further, Defendant claims that one of Plaintiffs' allegations is “another falsehood” and another “is not true.” In other words, there appear to be some disputed facts.

<sup>3</sup> For purposes of the cited Court Rule, under MCR 2.110 (emphasis added), “The term “pleading” **includes only:** (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer.” But “[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).”

A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

As stated, Defendant seeks partial summary disposition of Plaintiff's conversion claim and a part of Plaintiffs Count III for breach of contract.

Many of the parties' arguments center on language found in written contracts. Michigan law is well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Holmes v Holmes*, 281 Mich App at 594.

### **1. Conversion (Count I)**

Defendant first claims that it is entitled to dismissal of Plaintiffs' conversion claim because Plaintiffs only allege the conversion of property belonging to Defendant – specifically the client accounts existing as of the January 1, 2012 effective date.

Michigan law establishes that "[t]he tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights

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*Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

therein.” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App. 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

Plaintiffs’ conversion claim is based on the allegation that Defendant wrongfully “took control” of Continuum’s client accounts **before** the January 1, 2012 effective date. As a result, Plaintiffs allege that Defendant converted Continuum’s accounts in December 2011.

Defendant claims that it could not have converted Continuum’s client accounts in December 2011 because it had approval rights over all funds during December under the Pre-Closing Management Agreement. Then, on January 1, 2012, these accounts became Defendant’s property.

Indeed, under Section 5 of the Management Agreement, Continuum was responsible for invoicing its clients from December 1 to December 31, 2011. Continuum was also obligated, upon receipt of any funds, immediately deposit the same in its Comerica Operating Account. During this period, under Section 10 of the Management Agreement, Continuum was also required to obtain Mr. Doyle’s approval of any disbursements from the Operating Account.

But, Plaintiffs claim, Continuum did not invoice its clients during this time period; Defendant did. Plaintiffs also claim that Defendant did not deposit any funds received in December into Continuum’s Comerica Operating Account. Therefore, Plaintiffs claim that Defendant converted Continuum’s client accounts in December 2011.

This is relevant, Plaintiffs claim, because the lack of funds going into the Comerica Account caused certain expenses to go unpaid. Indeed, under Section 10 of the Management Agreement, the Comerica Account was to be used to pay Continuum’s “trade payables and to fund the payroll account” during the transition period. But because Defendant took over invoicing and control of money coming in (despite the Agreement otherwise), Plaintiffs allege that Defendant converted Continuum’s accounts to its own use during said period.

And Plaintiffs provide evidentiary support for each of their allegations in the form of deposition testimony, bank records, cancelled checks, invoice records, and email exchanges. Based on the same, a reasonable trier-of-fact could conclude that Defendant wrongfully took control over Continuum's client accounts in December 2011 and stalled invoicing or withheld deposits in order to get to the January 1, 2012 effective date.

For the foregoing reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Plaintiffs have sufficiently pled their conversion claim such that the Court cannot conclude that the same is so clearly unenforceable as a matter of law that no factual development could justify a right of recovery. As a result, the Defendant's motion for summary disposition of said claim under (C)(8) is DENIED.

For similar reasons and viewing all evidence in the light most favorable to Plaintiffs, the Court finds that there are numerous material questions of fact in dispute, such that Defendant is not entitled to judgment as a matter of law. Therefore, Defendant's motion for summary disposition of this claim under (C)(10) is also DENIED.

## **2. Breach of Contract (Count III)**

Defendant next seeks summary disposition of Plaintiff's Count III for breach of contract – “but only as to the portion of Count III that relates to amounts owed to or for the benefit of Plaintiff Schoeck.” This dispute solely presents a legal question about the meaning of the terms of a contract.

Plaintiffs' Count III alleges that the Purchase Agreement provides for the “immediate acceleration and immediate payment by CRT Medical to Continuum of [certain payments] in the event of a Change in Control [of Defendant]” before December 31, 2017. Plaintiffs claim (and Defendant does not dispute) that Defendant experienced such a “Change of Control” in

December 2014. As a result, Plaintiffs allege that Section 3.6 of the Purchase Agreement is triggered, and Defendant must pay \$294,769.27.

Defendant argues that Plaintiffs' allegations are "contradicted by the unambiguous terms of the Parties' Agreements and the [Consulting Services Employment Agreement]" and Plaintiffs' interpretation of Section 3.6 of the Purchase Agreement "simply makes no sense."

The Consulting Services Employment Agreement is a contract between Continuum's former majority owner, Plaintiff James Schoeck, and non-party Doyle Systems Consulting, Inc. Under this Consulting Agreement, Doyle Systems employed Schoeck as a consultant for Doyle Systems. Plaintiff does not allege a breach of this agreement in its Count III – although Defendant appears to argue otherwise.

Plaintiff actually alleges a breach of a contract between Continuum and Defendant – the Purchase Agreement. Under Section 3.6 of said Agreement, in the event of a "Change of Control" of Defendant (emphasis added):

**[Defendant] shall immediately accelerate and pay to [Continuum] any outstanding balance of the Purchase Price, RRC payment, and/or any other payment, as well as any outstanding compensation and commission due to Schoeck pursuant to the [Consulting Agreement] and Section 3.4(b) above as of the date of such Change of Control, as well as the remaining amounts of annual compensation under the [Consulting Agreement] through the expiration date of the term of the [Consulting Agreement] together with the monetary value of Schoeck's fringe benefits, including but not limited to health insurance covering Schoeck and his family, calculated through the expiration of the term as set forth in [the Consulting Agreement].**

The Consulting Agreement provides, in Section 6.(a), that the term of said Agreement "shall be four (4) years commencing on January 1, 2013 ("the Effective Date") and **expiring on December 31, 2017**, unless terminated sooner in accordance with this Agreement." The Agreement then continues, "This Agreement may be terminated prior to the expiration of the term in accordance with [certain conditions]."

It is undisputed that Doyle Systems terminated Schoeck without cause on October 16, 2014. As a result, he was due certain sums under the Consulting Agreement. Defendant argues that it is entitled to summary disposition of Plaintiff's Count III because Schoeck has received all that he is due under the Consulting Agreement.

But, as stated, Plaintiffs are not suing Doyle Systems based on a breach of the Consulting Agreement. In fact, Doyle Systems is not even a party to this lawsuit. Rather, Plaintiffs are suing based on Defendant's failure to pay what is owed when there has been a "Change of Control" under Section 3.6 of the Purchase Agreement.

While the Purchase Agreement looks to the Consulting Agreement to define the scope of damages, it does not incorporate the obligations or limits of the Consulting Agreement into the Purchase Agreement. In other words, Plaintiff alleges a breach of Defendant's contractual promise to pay certain damages in the event of a Change of Control under Section 3.6. Those damages are defined, in relevant part, as:

the remaining amounts of annual compensation under the [Consulting Agreement] **through the expiration date of the term of the [Consulting Agreement]** together with the monetary value of Schoeck's fringe benefits, including but not limited to health insurance covering Schoeck and his family, **calculated through the expiration of the term as set forth in [the Consulting Agreement].**

Defendant argues that the "**expiration date**" of the Consulting Agreement is actually the date that Doyle Systems **terminated** said Agreement with Schoeck (or October 16, 2014). But Defendant points to no language in support of this interpretation.

Rather, as Plaintiffs argue, based on the plain and unambiguous meaning of the reproduced provisions, the Consulting Agreement's **expiration date (or expiration of the term)** is December 31, 2017. Although Defendant confuses the terms "expiration of the term" with "termination date," the Consulting Agreement plainly provides that expiration and termination

are two distinct things. Otherwise, it would not refer to the ability to terminate “prior to the expiration of the term.”<sup>4</sup>

Defendant improperly concentrates on the phrase “due to Schoeck” – arguing that nothing is due to Schoeck since the Consulting Agreement was terminated – but that phrase does not appear in the category of damages that Plaintiffs appear to seek.

Under Section 3.6 of the Purchase Agreement, Plaintiff is entitled to the following “categories” of damages:

**[Defendant] shall immediately accelerate and pay to [Continuum]**

- (1) any outstanding balance of
  - a. the Purchase Price,
  - b. RRC payment, and/or
  - c. any other payment, as well as
- (2) any outstanding compensation and commission due to Schoeck pursuant to the [Consulting Agreement] and Section 3.4(b) above as of the date of such Change of Control, as well as
- (3) **the remaining amounts of annual compensation under the [Consulting Agreement] through the expiration date of the term of the [Consulting Agreement] together with the monetary value of Schoeck’s fringe benefits, including but not limited to health insurance covering Schoeck and his family, calculated through the expiration of the term as set forth in [the Consulting Agreement].**

It does not appear that Plaintiffs seek any damages from the first category of damages (identified as (1) above). But Plaintiff would be entitled to the same if unpaid.

The phrase “due to Schoeck” only appears in the second category of damages (identified as (2) above) that Defendant owes to Plaintiff in the event of a Change of Control. And this category of damages only implicates “outstanding” amounts owed – and only through the date of the Change of Control. Plaintiffs do not appear to seek any damages from this category.

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<sup>4</sup> Section 6.(b) provides: “This Agreement may be terminated **prior to** the expiration of the term in accordance with [certain conditions].” If termination can be prior to “expiration,” then they must be two distinct things.

The third category (identified as (3) above) implicates “the remaining amounts of annual compensation” and “the monetary value of Schoeck’s fringe benefits, including . . . health insurance” after the Change of Control through December 31, 2017. This is the category of damages sought by Continuum from Defendant. And this category has no limitation on what is “due to Schoeck,” and therefore, Doyle Systems’ termination of the Consulting Agreement has no effect on this calculation.

For all of the above reasons and viewing all evidence in the light most favorable to the nonmovant, the Court finds that there are no material questions of fact in dispute as to the meaning of Section 3.6 of the Purchase Agreement.

Defendant’s motion for partial summary disposition of Plaintiffs’ Count III under (C)(10) is DENIED.

But Plaintiffs’ motion for summary disposition **as to liability** on said claim is GRANTED. Plaintiff may seek damages based on Defendant’s failure to pay “the remaining amounts of annual compensation under the [Consulting Agreement]” and “the monetary value of Schoeck’s fringe benefits, including . . . health insurance” after the Change of Control through December 31, 2017. Damages on this Count remain a question of fact.

**IT IS SO ORDERED**

January 27, 2016  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge